Supreme Court, U.S.
FILED
04 154 JUL 2 - 2004
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No.

IN THE

Supreme Court of the United States

MEDIA GENERAL OPERATIONS INCORPORATED,
d/b/a Richmond Times-Dispatch, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the NLRB should have certified, without an evidentiary hearing, the results of an election over the timely filed objections of the Employer where the union, just hours before the election, distributed copies of a flier purporting to contain the signatures of a majority of employees declaring that they would vote "yes"?

2. Whether an employer has an obligation to recognize and bargain with an uncertified local union that demands bargaining absent a designation by the separate certified union that the uncertified local making the request is the agent of the certified union?

3. Whether the filing of an unfair labor practice charge by a certified union on March 26, 2001 constitutes a valid retroactive demand to bargain made by an uncertified union on February 15, 2001?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Media General Operations, Inc., d/b/a Richmond Times-Dispatch ("*Richmond Times-Dispatch*"), a nongovernmental party to the proceedings before the National Labor Relations Board, and the United States Court of Appeals for the Fourth Circuit.

Richmond Times-Dispatch here discloses that it is a business unit of Media General Operations, Inc. Media General Operations, Inc., is a subsidiary of Media General Communications, Inc. Media General Communications, Inc., is a subsidiary of Media General, Inc. Media General Communications, Inc., owns 100% of Media General Operations, Inc. stock. Media General, Inc., owns 100% of Media General Communications, Inc. stock. Media General, Inc., is a publicly traded corporation on the New York Stock Exchange with the symbol "MEG."

Respondent: The National Labor Relations Board ("NLRB" or "the Board"), is a governmental agency whose primary function is to administer the National Labor Relations Act ("NLRA")

The General Counsel is the independent legal counsel for the NLRB that is lead counsel for all legal proceedings aside from proceeding before this Honorable Court.

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RICHMOND TIMES-DISPATCH, Petitioner, by undersigned counsel, under the appropriate rules of the Court, requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The instant dispute arises from two (2) NLRB cases, NLRB Case No. 5-RC-15077, whereby the Board certified the International Association of Machinists and Aerospace Workers ("the International") after an NLRB-conducted, secret-ballot election on September 22, 2000, and NLRB Case No. 5-CA-29619, where the Board determined that *Richmond Times-Dispatch* unlawfully refused to bargain with the International. The Board's Decision and Order can be found at 338 NLRB No. 126 and is attached herein at Appendix (App.) 25a. The United States Court of Appeals for the Fourth Circuit, on March 4, 2004, granted the Board's Petition for Enforcement and denied *Richmond Times-Dispatch's* Cross-Petition for Review. The Decision of the Fourth Circuit can be found at 360 F.3d 434 (4th Cir. 2004) and is attached herein at App. 1a. The Fourth Circuit denied *Richmond Times-Dispatch's* Petition for Rehearing En Banc on May 4, 2004 and is attached herein at App. 37a.

The governing legislation is the NLRA, 29 U.S.C. 150 et seq.

JURISDICTION

The Board had subject matter jurisdiction over the underlying dispute pursuant to Section 10(c) of the NLRA, 29 U.S.C. 160(c). The United States Court of Appeals for the Fourth Circuit had appellate jurisdiction over the Cross-Petition for Review Pursuant to Section 10(f) of the NLRA, and appellate jurisdiction over the Petition for Enforcement pursuant to Section 10(e) of the NLRA. This Honorable Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§1253 and 1254.

RELEVANT PROVISIONS INVOLVED

National Labor Relations Act
Also cited NLRA or the Act;
29 U.S.C. §§151-169
[Title 29, Chapter 7, Subchapter II,
United States Code]

RIGHTS OF EMPLOYEES

Section 7. [§157.] Employees shall have the right to self-organization, to form, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Section 8. [§158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Restatement of the Law -- Agency
Restatement of the Law Second -- Agency
Current through March 2003

Chapter 1. Introductory Matters
Topic 2. Knowledge And Notice
§9. Notice

(1) A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it.

(2) A person is given notification of a fact by another if the latter

(a) informs him of the fact by adequate or specified means or of other facts from which he has reason to know or should know the facts: or

(b) does an act, which, under the rules applicable to the transaction, has the same effect on the legal relations of the parties as the acquisition of knowledge or reason to know.

(3) A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it, under circumstances coming within the rules applying to the liability of a principal because of notice to his agent.

STATEMENT OF THE CASE

A. Background

Richmond Times-Dispatch prints and publishes a newspaper in the Richmond, Virginia area. On August 11, 2000, the International Association of Machinists and Aerospace Workers, AFL-CIO, CLC, filed an election petition, designated NLRB Case No. 5-RC-15077, seeking to represent a specific group of employees. At the representation hearing prior to the election, when asked which union should be on the ballot, Lodge 10 or the International, International Representative Tommy Daves affirmatively said the International. There were 31 employees in the stipulated unit. An election was scheduled for September 22, 2000.

B. The International's Unlawful Pre-election Conduct.

On the eve of the election, mere hours prior to entering the election booth, eligible voters were surreptitiously inundated, at their workplace, with multiple copies of an undated petition purportedly signed by employees indicating how twenty (20) employees were going to vote. The petitions were on the facsimile machine, on employee benches, in toolkits, on desks, on walls, on the refrigerator, on the shop floor – in short, the petitions littered the workplace.

The petitions claimed that certain named employees in the voting unit were voting "yes" in the election scheduled to begin in a few hours. In large,

bold, lettering the petitions bore the title "**WE ARE VOTING YES**." The petitions stated:

> We have made a commitment and will promise to ourselves, each other, and to the International to vote YES! WE WILL NOT FALL FOR THE COMPANY'S SCARE TACTICS! ... Furthermore we AUTHORIZE the International to use this petition THROUGH ANY METHOD to urge our coworkers to vote YES ... WE WILL NOT CHANGE OUR MINDS. WE WILL STAND BY OUR WORD! WE WILL VOTE YES!

Petitions were distributed just prior to the election; *Richmond Times-Dispatch* had no opportunity to respond before the employees voted. When the ballots were counted, the International had won the election by the slightest of margins; sixteen (16) ballots cast for the International versus fifteen (15) ballots cast against.

C. Employees Express Fear About the Petitions.

Two (2) days before the election, on September 20, 2000, an employee, Leroy Anderson came to his supervisor, Director of Operations William Barker, and asked if he could remove his name from a document he signed at a union meeting. Mr. Anderson was extremely concerned that the document was binding. Mr. Anderson described the document as a "straw vote." Mr. Anderson was very anxious when he spoke

to Mr. Barker. In response to Anderson's fears, *Richmond Times-Dispatch* distributed a memorandum to the employees explaining that a "straw vote" was not binding; only the final vote mattered. Thereafter, hours prior to the election, copies of petitions littered the workplace purporting to demonstrate to employees that the result of the election was a foregone conclusion. The petition was dramatically different from any "straw vote" imagined by *Richmond Times-Dispatch*. The damage had been done. Employees had literally been "outed" by the union for an election that was supposed to be confidential.

Following the election, employees voluntarily gave statements to *Richmond Times-Dispatch* explaining that the International had coerced, intimidated and threatened them to sign the petition. The International had corralled employees in a room, and a union representative induced employees to sign by passing an unsigned petition around a table where the gathered employees watched each coworker sign. For good measure, the union representative brought with him his attorney to further intimidate the employees, and capped off the coercion by exclaiming that signing the petition is how to "separate the men from the boys." Employees stated that the petition misrepresented their intentions and had a coercive effect on their vote. Additionally, other employees who had not signed the petition voluntarily gave affidavits stating that the petition had an impact on them and others. Employees that had not signed the petition felt their vote was useless because the results of the election were a foregone conclusion. *Richmond Times-Dispatch* timely filed Objections to Conduct Affecting the Results of the Election with Region 5.

D. The Petition was Fraudulent.

Of significant import was that the petition, on its face, was a fraudulent document; it contained a forged signature. The signature associated with the printed name of Mr. Richard Tingler was the signature of Mr. William Slayton, listed two lines below Mr. Tingler. After six (6) weeks of investigating, the Acting Regional Director of Region 5 determined Tingler's purported signature as "authentic."

E. Richmond Times-Dispatch Asks the Region to Reconsider its Erroneous Decision.

Richmond Times-Dispatch, thereafter, filed a Motion for Reconsideration with Region 5, and provided authentic signatures to demonstrate the forged signature of Mr. Tingler. *Richmond Times-Dispatch* argued that if the Acting Regional Director could not recognize the forgery after six (6) weeks of investigating, and after *Richmond Times-Dispatch's* pleading against the authenticity of the signature, then certainly no employee confronted with the petition hours before the election, without the benefit of *Richmond Times-Dispatch's* pleadings, could recognize the forgery for the propaganda that it was. Finally, *Richmond Times-Dispatch* argued that the publication of the petition created fear of reprisal by management because the International had "outed" and publicly listed names of employees allegedly vowing to vote for the union and against *Richmond Times-Dispatch*.

Richmond Times Dispatch demanded that the results of the election be set aside, or failing that

remedy, an evidentiary hearing be held on the post election objections filed by *Richmond Times-Dispatch.*

Pursuant to NLRB Rules and Regulations, *Richmond Times-Dispatch* also filed Exceptions, with an accompanying brief, to the Acting Regional Director's Report on Objections.

F. Region 5 Contradicts Itself and Demonstrates Its Own Forgery Standard.

The Regional Director of Region 5 denied *Richmond Times-Dispatch's* Motion for Reconsideration. In support of his denial, the Regional Director contradicted the Acting Regional Director and stated that it was "obvious" that the signature attributed to that of Mr. Tingler was in fact not Mr. Tingler's. Conspicuously, the Regional Director referred to the results of the *ex parte* internal investigation of the Region to verify how and why Tingler signed the petition.

Richmond Times-Dispatch immediately filed, with the Board, Supplemental Exceptions to the Regional Director's denial of *Richmond Times-Dispatch's* Motion for Reconsideration. Thereafter, on January 24, 2001, the Board issued an unpublished Decision and Certification of Representative denying the Exceptions and Supplemental Exceptions *Richmond Times-Dispatch* had filed in response to the conflicting and erroneous decisions of the Acting Regional Director and Regional Director, respectively.

G. Lodge 10, an Uncertified and Unrecognized Local Labor Organization, Demands Recognition and Bargaining of Richmond Times-Dispatch.

On February 15, 2001, Lodge No. 10 drafted a letter to Mr. Albert T. August, III, the President and General Manager of *Richmond Times-Dispatch*. The letter was on Lodge 10 letterhead and signed by Lodge 10 Business Representative, Stephen Spain. Lodge 10 demanded certain information "which we feel is essential to bargain intelligently on the issues of wages and working conditions in the forthcoming negotiations," and asked that the data be sent to Mr. Spain, the Business Representative of Lodge 10, "as soon as possible." There was no mention of the International.

This was the first time *Richmond Times-Dispatch* received any communication from Lodge 10. All prior communications were from the International. The International filed the election petition. The International negotiated and signed the Stipulated Election Agreement; when asked by a Region 5 agent, the International asked to be, and was, the labor organization on the election ballot. An International representative signed the Tally of Ballots. Furthermore, the Board certified only the International as the exclusive collective bargaining agent.[1]

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[1] *Richmond Times-Dispatch*, in making this statement here and throughout this Brief, in no way waives its argument that the certification of the International was invalid.

Lodge 10 was not the union the employees had petitioned to represent them, nor was it the union on the election ballot, or certified by the Board. Lodge 10 was a different union. There was no relationship between *Richmond Times-Dispatch* and Lodge 10.

On March 13, 2001, Mr. August replied only to Lodge 10 and stated to Mr. Spain that *Richmond Times-Dispatch* "declines to recognize or bargain with your union." Lodge 10 was not the certified collective bargaining representative. The International never designated Lodge 10 to bargain on its behalf. The purpose of the letter was to make it clear that *Richmond Times-Dispatch* would not recognize or bargain with a union not certified.

H. The International Files a Charge; the Region Issues a Complaint.

On March 26, 2001, the ***International*** filed a charge (numbered 5-CA-29619) against *Richmond Times-Dispatch* alleging that *Richmond Times-Dispatch* had refused to bargain with the International by not acceding to uncertified Lodge 10's demand. Curiously, the International attached copies of the correspondence between Lodge 10 and *Richmond Times-Dispatch* to the charge. *Richmond Times-Dispatch* denied the allegations of the charge. Region 5 issued a Complaint and Notice of Hearing alleging that *Richmond Times-Dispatch* had refused to bargain with the International, and *Richmond Times-Dispatch* filed an Answer. The General Counsel thereafter filed a Motion for Summary Judgment with the Board. *Richmond Times-Dispatch* likewise filed a Motion for Summary Judgment.

Richmond Times-Dispatch maintained that the International – the certified collective bargaining representative – had never made a demand to bargain on *Richmond Times-Dispatch*. *Richmond Times-Dispatch* challenged the General Counsel to demonstrate where, in the voluminous Record supplied by the General Counsel to the Board, the International had made its demand to bargain upon *Richmond Times-Dispatch*. The General Counsel countered with the bald assertion that it was evident that Lodge 10 was acting on behalf of the International. This argument was advanced absent any designation, or even any claim of designation, of Lodge 10, by the International.

I. The Board Finally Makes a Decision.

On or about March 28, 2003, the Board, after almost two (2) years, issued a Decision and Order granting the General Counsel's Motion for Summary Judgment and denying *Richmond Times-Dispatch's* Motion for Summary Judgment. Inexplicably, the Board determined that even if the letter on Lodge 10 letterhead, made by Lodge 10 Business Representative Stephen Spain, was not a sufficient demand by the International, the refusal to bargain charge "clarified any ambiguity as to which entity was requesting bargaining." The Board announced a new principle of law, namely that an agency relationship exists between an International and its local affiliate, and, an employer is equally liable for failing to deal with an uncertified labor organization as it is failing to deal with a certified labor organization. Furthermore, the Board put the onus upon an employer to determine if a demand for recognition and bargaining was, in fact, valid.

On April 15, 2003, the Board filed a Petition for Enforcement in the United States Court of Appeals for the Fourth Circuit. On May 9, 2003, *Richmond Times-Dispatch* filed a Cross-Petition for Review. On March 4, 2004, the Fourth Circuit issued an Order and accompanying Opinion granting the NLRB's Petition for Enforcement. The court's decision, in effect, ruled that the later filing of an unfair labor practice charge alone by the certified union constituted a valid retroactive demand to bargain (by the certified union) even though the original demand was made by an uncertified union. On May 4, 2004, the Fourth Circuit denied *Richmond Times-Dispatch's* Petition for Rehearing En Banc.

It is from this legally and factually framed Opinion and Order that *Richmond Times-Dispatch* now petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THIS HONORABLE COURT'S DECISION IN NLRB V. SAVAIR MFG. CO, 414 U.S. 270, 94 S.Ct 495, 38 L. Ed. 2d (1973), AND THE BOARD'S SUPPORTING INTERPRETATION OF SAVAIR IN FERMONT, 286 NLRB 920 (1987).

This Court's *Savair* decision has two (2) principles. The first principle is that the election process of an NLRB-conducted, secret-ballot election is damaged when a union manipulates voters by creating a sense of obligation to vote in accordance with expressed sentiments. *See* 414 U.S. at 277, 94 S.Ct at 499. The second principle is that the election process is damaged when a union creates a false portrait of support by manifestations of pro-union sentiment that are purchased rather than genuine. *Id.*

The Board, in interpreting *Savair*, overturned an NLRB-conducted, secret-ballot election and ordered a re-election, where a company "sponsored a contest in which employees were to 'point out something good about [the company] or why everyone should VOTE NEITHER'." *Fermont*, 286 NLRB 920, 920 (1987). The Board determined this campaign tactic to be unlawful because:

> ... an employee who submits a contest slogan prior to the election encouraging

> other employees to 'vote neither' or say something positive about the company is indicating to other workers that he does not support the union. This outward manifestation of company support may often serve as a useful campaign tool to convince other employees to vote against the union, if only because many employees respect their coworkers' views on the unionization issue.

Id. While the Board did recognize that on the particular facts of *Fermont*, it was "obvious that the [employer] was buying endorsements, with a promise of material awards of significant monetary value," it specifically disagreed with the theory that the secret-ballot nature of the election was enough to dissuade employees from feeling obligated to vote against the union. *Id.* at 921. The Board explained:

> We are relying on the reasoning of the *Savair* majority, who perceived damage to the election process ***both in the creation of a sense of obligation to vote in accordance with express sentiments*** and the "false portrait" created by manifestations of pro-union sentiment that were purchased rather than genuine.

Id. (citing *Savair*, 414 US at 277-78) (emphasis added).

The Board recognized that *Savair* spoke of two (2) issues, purchasing endorsements, and a sense of obligation to vote in accordance with expressed

sentiments, be they an individual's sentiments, or the sentiments of a coworker. The second issue is what unlawfully influenced *Richmond Times-Dispatch* employees in the instant election.

In *Fermont*, it was the employer who violated the Act. In the instant case, the International violated the Act. The Board's decision in the instant case was arbitrary and inconsistent. As a result, the election should be overturned and a second election should be directed. In the alternate, *Richmond Times-Dispatch* has raised enough of a material issue of fact to warrant a hearing. This writ should be granted.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT'S DEPARTURE FROM ACCEPTED AND USUAL LEGAL PROCEEDINGS THAT CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER; THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS ENTERED A DECISION THAT RECOGNIZES AN AUTOMATIC AGENCY RELATIONSHIP BETWEEN AN INTERNATIONAL UNION AND ITS LOCAL AFFILIATE, AND THAT AN UNFAIR LABOR PRACTICE CHARGE CONSTITUTES A VALID DEMAND TO BARGAIN; THIS HOLDING CONFLICTS WITH HOLDINGS OF OTHER UNITED STATES COURTS OF APPEALS.

A. The International Never Made a Lawful Demand to Bargain.

Assuming, *arguendo*, that the certification was valid, the designated collective bargaining agent, the International, never made a demand to bargain. The Board has ignored the fact that the International, the union whose name was on the Petition for Election, the Stipulated Election Agreement, the Tally of Ballots, and the Certification of Representative, never made a request to bargain of *Richmond Times-Dispatch*.

It is well settled that an International union and its local affiliates are separate and distinct labor organizations. *See Advanced Construction Services, Inc. v. NLRB*, 247 F.3d 807 (8th Cir. 2001); *United*

Electrical, Radio and Machine Workers of America (UE) v. NLRB, 986 F.2d 70, 75 (4th Cir. 1993); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1385 (9th Cir. 1984); (*International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. NLRB)*, 394 F.2d 757, 760 -761 (D.C. Cir. 1968); *California Pie Company, Inc.*, 329 NLRB No. 88 *Slip op.* at 32-33 (1999); *Newell Porcelain Company, Inc.*, 307 NLRB 877, 878 (1992)). In spite of this well settled law, the Board granted summary judgment against *Richmond Times-Dispatch.*

The Fourth Circuit enforced the Board's Order, even though it acknowledged that an International union and its Local Affiliate are separate and distinct labor organizations. (App. at 19a). The court concluded that the International's unfair labor practice charge, filed on March 26, 2001, clarified Lodge 10's February 15, 2001 letter – on Lodge 10 letterhead signed by a Lodge 10 representative – and constituted a valid demand to bargain. This ruling conflicted with clearly enunciated legal principles surrounding agency and valid demands to bargain.

Ironically, in *United Electrical, Radio and Machine Workers of America* (*UE*), the Fourth Circuit explained "recognizing a union (in that case the International over the Local) as the certified collective bargaining representative would have bestowed upon UE the Act's wide authority to negotiate all of the workers' conditions of employment when in fact the workers voted only for the Local to wield this power." 986 F.2d at 74 (citing 29 U.S.C. §159(a); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 339, 73 S. Ct. 681, 686, 97 L. Ed. 1048 (1953). The same was true in the instant case.

The employees of the *Richmond Times-Dispatch* voted only for the International to be their certified bargaining representative. Recognizing Lodge 10, over the International, would have bestowed bargaining power upon Lodge 10, when the *Richmond Times-Dispatch* employees had voted only for the International to wield this power.

The policy change announced by the Board and affirmed by the Fourth Circuit, in this case, has broad-sweeping ramifications that conflict with established law. *Richmond Times-Dispatch* has a duty to bargain with a certified bargaining representative by 29 U.S.C. §158(a)(5). This is an exclusive duty. *Richmond Times-Dispatch* has a negative duty therefore, to bargain with no other entity than a lawfully certified bargaining representative. *EU*, 986 F.2d at 75 (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684, 64 S. Ct. 830, 833, 88 L. Ed. 1007 (1944)). Had *Richmond Times-Dispatch* agreed to bargain with Lodge 10, it would have bypassed the employees' certified collective bargaining representative. *Richmond Times-Dispatch* recognized that employers have been held to violate Sections 8(a)(1) and (2) of the National Labor Relations Act, (29 U.S.C. §§ 158(a)(1) and 158(a)(2)) even when not intending to do so. *See* 986 F.2d at 75 (citing *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 733-39, 81 S. Ct. 1603, 1607-08, 6 L. Ed. 2d 762 (1961) (Holding it unlawful for an employer to negotiate with a labor organization other than the workers' majority representative, even when the employer believed in good faith that the union enjoyed majority status)).

As a result, *Richmond Times-Dispatch* never had a duty to bargain with Lodge 10. *Richmond Times-Dispatch* was only under a duty to bargain with the employees' certified bargaining representative, the International. The International made no demand to bargain; *Richmond Times-Dispatch* did not violate Sections 8(a)(1) and (5) of the NLRA. The Decision and Order of the Board, and the Fourth Circuit's enforcement of the Board's Decision and Order, was clear error of law. This Writ should be granted.

B. There Was Never a Valid Designation or Delegation by the International.

1. Agency Relationships Do Not Automatically Exist Between an International Union and its Uncertified Local Affiliate.

There was no valid designation by the International that Lodge 10 was authorized to bargain on its behalf. The instant issue is governed by the common law test of agency where a third party must receive notice that an agent may act on behalf of a principal. *See* RESTATEMENT (SECOND) OF AGENCY §9 (1958).

A principal must designate its agent. The principal in the instant case – the International – never designated an agent to bargain on its behalf. Only Lodge 10 asked *Richmond Times-Dispatch* to bargain with it, exclusively.

The seminal case on this issue is *Auto Workers v. NLRB*, where the D.C. Circuit wrote:

> In the first place, where the International has been certified, an employer could hardly be held guilty of an unfair labor practice for failing to recognize a local union, which was not certified. And we think this rule must apply even if the Local acts as an integral part of the single joint representative of the employees at the bargaining table. An uncertified organization cannot, it seems to us, inject itself where there is a certification, in the face of the statutory provisions as to exclusiveness, certification, etc.

394 F.2d 757, 761 (D.C. Cir. 1968), *cert. denied* 393 U.S. 831 (1968), (noting 29 U.S.C. 159(a)). This principle was explicitly endorsed by the Board in *Newell Porcelain Company, Inc.*, 307 NLRB 877 (1992).

In *Newell Porcelain*, the employer did not commit an unfair labor practice by refusing to bargain with an uncertified union; "... an uncertified organization cannot inject itself into a labor relationship where there is a certification . . ." 308 NLRB at 878 (citing *Auto Workers v. NLRB*, 394 F.2d at 761.) Lodge 10 attempted to inject itself into a labor relationship where it was not certified.

Richmond Times-Dispatch never received notice that Lodge 10 was authorized to act on behalf of the International. *Richmond Times-Dispatch* only received a demand to bargain from Lodge 10 – an uncertified organization – on Lodge 10 letterhead, from a Lodge 10 business representative. To date the

International has not designated Lodge 10 as its bargaining representative.

The Board's Decision and Order cited *Parkview Manor*, 321 NLRB 477 (1996), which in turn cited *Williams Enterprises*, 312 NLRB 937, 938-939 (1993), enf'd 50 F.3d 1280 (4th Cir. 1995), for the proposition that the charge filed by the International on April 2, 2001, that referred to the February 15, 2001 letter drafted by Lodge 10, "clarified any ambiguity as to which entity was requesting bargaining." 338 NLRB No. 126, slip op at 2. The citation of *Williams Enterprises*, in *Parkview Manor*, as authority for the proposition that a later unfair labor practice charge filed by a separate entity can clarify ambiguity, when a separate organization makes an initial demand to bargain, is simply incorrect.

Williams involved a ***successor employer***. *See* 312 NLRB at 937. The issue in *Williams* was whether the successor employer had a duty to bargain with the same union that represented the same group of employees at the predecessor employer. *Williams* stated that "the Board has on several occasions found that the filing of a refusal-to-bargain charge reaffirms a union's earlier request for recognition." 312 NLRB at 938. The cases noted for this proposition, *Fall River Dyeing Corp. v. NLRB* 482 U.S. 27, 107 S. Ct 2225, 96 L. Ed. 2d 22 (1987), and *Enterprise Products Co.*, 265 NLRB 544 (1982), involved successorship principles. Each of these cases involved the ***same*** union making a demand to bargain and filing a subsequent refusal to bargain allegation.

In *Williams*, the Fourth Circuit enforced the Board's Order insofar as the successor company had a duty to bargain with the union, that an employee petition demonstrating lack of majority support was tainted by Management's statements, the petition could not justify a later refusal to bargain, and an affirmative bargaining order was appropriate. ***The* Williams *case did not stand for the proposition that an uncertified union's demand to bargain on an employer, coupled with an unfair labor practice charge filed by the actual certified collective bargaining representative, clarified any ambiguity as to which entity demanded bargaining and equated to a valid demand for bargaining by the actual certified representative.*** (Emphasis supplied). The basis of *Parkview Manor* was flawed; the legal principle for which it cited *Williams* is nonexistent and unsupported.

The Fourth Circuit glossed over this error, in its Opinion, and compounded it by deferring to the Board's interpretation of *Williams*. (App. at 19a). The court made a conclusory assertion that "the Board's finding on this point is based on substantial evidence," a curious finding in that there was never an evidentiary hearing, *Richmond Times-Dispatch* was not a successor employer, and a different union made the demand to bargain than the union that filed the unfair labor practice charge.

Contrary to the Board's Decision and Order, the charge filed by the International on April 2, 2001, that referred to the February 15, 2001 letter written to *Richmond Times-Dispatch* by Lodge 10, actually created ***more ambiguity*** (emphasis supplied) rather

than clarified ambiguity. At that point in time, only Lodge 10 had made a demand to bargain. The International had made no demand to bargain. Yet Lodge 10, to whom *Richmond Times-Dispatch's* response was directed, did not file an unfair labor practice charge alleging a refusal to bargain. Instead the International, an entity that was not the recipient of *Richmond Times-Dispatch's* letter, alleged that *Richmond Times-Dispatch* had refused to bargain with it.

The Board, in the instant Decision and Order, created an automatic agency relationship between an International and its local unions. The Fourth Circuit endorsed this proposition. The Fourth Circuit's Order and Decision conflicts with Orders and Decisions of this Honorable Court, as well established Board law, and the Restatement of Agency. The Decision and Order of the Board was clearly erroneous. The Fourth Circuit failed to correct the error. The Decision and Order should not stand. The Writ should be granted.

2. The Fourth Circuit Has Turned the Duty to Bargain on Its Head.

Richmond Times-Dispatch, and employers, have been put in a vulnerable position by the Board, and the Fourth Circuit. *Richmond Times-Dispatch* has a duty to bargain with a certified bargaining representative by 29 U.S.C. §158(a)(5). This is an exclusive duty. *Richmond Times-Dispatch* has a negative duty therefore, to bargain with no other entity than a lawfully certified bargaining representative. *See, UE*, 986 F.2d at 75.

Richmond Times-Dispatch has never been under a duty to bargain with Lodge 10. Lodge 10 was never the employees' certified bargaining representative. As a certified collective bargaining representative has made no demand to bargain, *Richmond Times-Dispatch* cannot be in violation of Sections 8(a)(1) and (5) of the Act. The International never made a request to bargain; there can be no unfair labor practices as a valid demand for bargaining has not been made.

A major consequence of the Board's decision is that every company that receives a demand to bargain from an uncertified union is put in the unsavory position of being in violation of the NLRA, if the separate, certified union, thereafter, files an unfair labor practice charge alleging that the company is not bargaining with the designated union. In footnote four (4) of the Board's Decision and Order, the Board turned the duty of bargaining on its head by requiring a company to determine whether a demand to bargain was made by a legitimate representative, when it stated:

> *Newell Porcelain Co.*, 307 NLRB 877 (1992), petition for review denied sub nom. *Electrical Workers UE v. NLRB*, 986 F.2d 70 (4th Cir. 1993), relied on by the Respondent, is distinguishable. In *Newell Porcelain*, a company obligated to bargain with a newly certified union made a good faith, albeit unsuccessful, effort during negotiations to ascertain that it was in fact negotiating with that union, and was held justified in suspending negotiations

> pending clarification of the identity of the party with which it was negotiating. By contrast, the Respondent here made no attempt to clarify the asserted ambiguity and ascertain the relationship between Lodge 10 and the International.

In so doing, the Board has implicitly authorized companies to determine the legalities of a bargaining demand, in effect usurping the statutory authority of the Board. A union has a burden to legally demand bargaining of a company that employs employees it represents. *See Newell Porcelain*, 307 NLRB at 878. A certified union has the duty to clarify who is demanding bargaining, not an employer. *Id.* The presumably unintended ramification of the Board's Decision and Order upheld by the Fourth Circuit, is that the Board has excused a union from its duty to legally demand bargaining of an employer and, instead, permitted a union to obfuscate a demand to bargain and require an employer to determine whether such a demand was lawful.

At the time Lodge 10 wrote its letter, the International had not communicated to *Richmond Times-Dispatch* that it had designated anyone to act as its agent for bargaining. For the Board to hold that the subsequent filing of an unfair labor practice by the International, based on Lodge 10's letter, retroactively put *Richmond Times-Dispatch* on notice that the International had authorized or designated Lodge 10 to be its agent for bargaining does not make any sense whatsoever. Neither the Board nor the Fourth Circuit have recognized the unintended consequences of this decision.

3. An Unfair Labor Practice Charge Cannot Constitute a Valid Demand to Bargain.

The Fourth Circuit's Decision and Order stands for the proposition that an unfair labor practice charge constitutes a valid demand to bargain. This notion directly conflicts with the District of Columbia circuit case of *R.C. Aluminum Indus. v. NLRB*, 326 F.3d 235, 243 (D.C. Cir. 2003). In *R.C. Aluminum*, the D.C. Circuit wrote, "We do not go so far as saying that a charge alone could constitute a valid demand (to bargain)." 326 F.3d at 243.

The problem with recognizing an unfair labor practice charge as a valid demand to bargain, especially in the instant case, is that an employer must possess preternatural powers to predict whether a certified union will file a charge in the future if a union other than the certified union makes a demand to bargain. An employer now must decide whether to risk recognizing and bargaining with a labor organization other than a certified labor organization (in and of itself a violation of Section 8(a)(2) of the Act), or risk an unfair labor practice charge if, and when, the certified union files a charge.

The demand to bargain ostensively made by the International, through the charge filed with the Region on April 2, 2001, did not constitute a valid, lawful demand to bargain on February 15, 2001. The Fourth Circuit misapplied this legal tenet and put itself in conflict with the Eighth, Ninth, and D.C. Circuits. For this reason, *Richmond Times-Dispatch's* Writ should be granted.

CONCLUSION

For any and all of the above reasons, *Richmond Times-Dispatch* respectfully asks this Honorable Court to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

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(Any footnotes trail end of each document)

No. 03-1469

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MEDIA GENERAL OPERATIONS,
INCORPORATED, d/b/a Richmond Times-Dispatch,
Respondent.

MEDIA GENERAL OPERATIONS,
INCORPORATED, d/b/a Richard Times-Dispatch,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

December 3, 2003, Argued
March 4, 2004, Decided

COUNSEL: ARGUED: Louis Michael Zinser, THE ZINSER LAW FIRM, P.C., Nashville, Tennessee, for Medial General. James Matthew Oleske, Jr., NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Board.

ON BRIEF: Glenn E. Plosa, THE ZINSER LAW FIRM, P.C., Nashville, Tennessee, for Media General. Arthur F. Rosenfeld, General Counsel, John E. Higgins, Jr., Deputy General Counsel, John H. Ferguson, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Fred L. Cornell, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Board.

JUDGES: Before WIDENER and KING, Circuit Judges, and Richard D. BENNETT, District Judge of the United States District Court for the District of Maryland, sitting by designation.

OPINION BY: KING

OPINION: KING, Circuit Judge:

The National Labor Relations Board has applied to this Court for enforcement of its March 28, 2003, Decision and Order issued against Media General Operations, Incorporated, d/b/a Media Gen. Operations, Inc., 338 N.L.R.B. No. 126 (2003) (the "Order"). By its Order, the Board found that Media General had violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act"), and it ordered Media General to bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO (the "International" or "IAM") as the exclusive bargaining representative of certain Media General employees. *Id.* Media General has crosspetitioned for our review of the Order. As explained below, we grant the Board's application for enforcement and we deny Media General's cross-petition for review.

I.

A.

Media General is a Virginia newspaper publisher that operates a production facility in Mechanicsville, Virginia. On August 11, 2000, the International filed a petition with the Board seeking to represent a group of the Mechanicsville production facility's maintenance and facilities employees. On August 25, 2000, Media General and the International entered into a "Stipulated Election Agreement," which identified the employees to be included in the bargaining unit and provided that a secret-ballot election would be held on September 22, 2000, to determine whether those employees would be represented by the International.n1

On September 13, 2000, the International conducted a voluntary meeting for the employees in the proposed bargaining unit. At the meeting, an International representative circulated a petition that reflected a signing employee's intention to "vote yes" for representation by the International in the upcoming election (the "Vote Yes Petition"). The Vote Yes Petition provided, in relevant part:

WE ARE VOTING YES!

We, the undersigned employees of TIMES DISPATCH located in, [sic] Richmond, Virginia hereby authorize the International Association of Machinists and Aerospace Workers (IAM) to represent us in collective bargaining with our employer.

We have made a commitment and promise to ourselves, each other, and to the IAM to vote YES! WE *WILL NOT* fall for the company's scare tactics!

Furthermore, we AUTHORIZE the IAM to use this petition THROUGH ANY METHOD to urge our co-workers to vote YES.

WE WILL NOT CHANGE OUR MINDS!

WE WILL STAND BY OUR WORD!

WE WILL VOTE YES!

During this meeting, and at a later meeting, the International solicited signatures on the Vote Yes Petition. According to two employees in attendance, one of the International's representatives stated that he wanted everyone to sign the Vote Yes Petition, and he commented, "this is where you separate the men from the boys."

Several employees who attended the meetings discussed the Vote Yes Petition with Media General officials, and one of them informed Media General that the Vote Yes Petition would be made public. In response, Media General, two days before the election, circulated a Memorandum to the employees in the proposed bargaining unit, advising them of their unconditional right to "vote no" on union representation and of their right to choose not to attend the International's meetings (the "Company Memorandum"). The Company Memorandum, from Director of Operations William R. Barker (" Director Barker"), characterized the Vote Yes Petition as a

"straw vote" and stated, in relevant part: Let me make a few things clear. That straw vote means nothing. It cannot be used in any way at the election on Friday. Regardless of whatever you may have written down at the "straw vote," on Friday you still get to vote your free choice in the NRLB-conducted secret ballot election. You have the absolute right to Vote NO on Friday regardless of whatever you did in the "straw vote."

I was also told by some of you that the union has a meeting scheduled tonight. Whether or not you attend that meeting is your free choice. I wanted to make clear to you that you have no obligation to attend that meeting in order to try to correct or change your vote in last week's "straw vote." You may decide to freely skip tonight's union meeting and to go to the polls on Friday, September 22 and VOTE NO in the NLRB-conducted secret ballot election.

On September 21, 2000, the day before the election, employees in the proposed bargaining unit distributed copies of the Vote Yes Petition throughout the Mechanicsville workplace. It contained twenty employee names, most of which were printed on lines in the left-hand column of the Vote Yes Petition, with corresponding signatures on lines in a separate column to the right of the printed names. One employee, Richard Tingler, had printed his name in the left-hand column of the Vote Yes Petition, but he had failed to sign his name in the right-hand column. Instead, the signature of William D. Slayton, another employee, was on the line in the right-hand column next to Tingler's printed name. Slayton's name was also printed, and

signed for a second time, two lines below Tingler's printed name.

On September 22, 2000, the Board conducted the scheduled secretballot election. Sixteen employees in the proposed bargaining unit cast ballots in favor of collective-bargaining representation by the International, while fifteen employees voted against such representation.

B.

On September 29, 2000, Media General filed objections to conduct affecting the results of the election with the Board's Regional Director. n2 Among its objections, Media General asserted that the International had violated "established law" by circulating copies of the Vote Yes Petition on the eve of the election, and it requested that the election be set aside. Media General also claimed that the Vote Yes Petition contained a forgery because "the hand that started printing 'Richard G. Tingler' was not the same hand that concluded printing 'Richard G. Tingler.'" n3 On November 16, 2000, the Regional Director issued a report recommending that Media General's objections be overruled and that a Certification of Representation be issued. Media General, 338 N.L.R.B. No. 126, Case 5-RC-15077, at 9 (Nov. 16, 2000) (the "Report on Objections"). Before the Board acted, Media General filed a motion for reconsideration of its objections, which was denied by the Regional Director on December 27, 2000. Media General, 338 N.L.R.B. No. 126, Case 5-RC-15077 (Dec. 27, 2000) (the "Order Denying Reconsideration").

On January 24, 2001, the Board adopted the findings made by the Regional Director in his report of November 16, 2000. Accordingly, the Board certified the International as the exclusive collectivebargaining representative of the employees in the proposed bargaining unit. Media General, 338 N.L.R.B. No. 126, Case 5-RC-15077 (Jan. 24, 2001) (the "Certification Decision").

On February 15, 2001, the International's local affiliate, Richmond Lodge No. 10, International Association of Machinists and Aerospace Workers (" Lodge 10"), directed a letter to Media General requesting bargaining unit information that Lodge 10 considered "essential to bargain intelligently on the issues of wages and working conditions in the forthcoming negotiations" (the "February Letter"). Media General responded to the February Letter on March 13, 2001, stating, "this letter is in response to your letter dated February 15, 2001. Please be advised, with all due respect, that the *Richmond Times-Dispatch* declines to recognize or bargain with your union."

On April 2, 2001, the International filed with the Regional Director an unfair labor practice charge against Media General. n4 The charge asserted that Media General had interfered with, restrained, and coerced employees in the exercise of their rights under section 8(a)(1) of the Act, and that it had refused to bargain in good faith with the International, in violation of section 8(a)(5) of the Act. n5 In support of its contention that Media General had refused to bargain, the International stated that it had "requested negotiations" on February 15, 2001, and that Media General had "declined our request on March 13, 2001."

Acting on the International's allegations, the Regional Director, on April 16, 2001, issued a Complaint and Notice of Hearing against Media General, asserting violations of sections 8(a)(1) and 8(a)(5) of the Act. n6 In its Answer, filed on April 26, 2001, Media General denied that it had refused to bargain with the International and claimed that it was "under no duty to bargain with IAM as the certification election was tainted by IAM's objectionable conduct. IAM's objectionable conduct prevented voters from freely and fairly selecting whether or not to be represented."

On May 11, 2001, the Board's General Counsel moved for summary judgment on the Complaint, and on May 16, 2001, the Board issued a notice to show cause why summary judgment should not be awarded. n7 In response to the show cause notice, Media General reiterated its objection to the Board's certification of the International, and it further maintained that "no one on behalf of the IAM has ever made a demand to bargain." Although Media General admitted that Lodge 10 had submitted a valid bargaining demand in the February Letter, it contended that the February Letter was not attributable to the International.

On March 28, 2003, the Board issued the Order underlying this dispute, granting the General Counsel's motion for summary judgment. In so ruling, the Board determined that Media General had presented no newly discovered evidence on the validity of the election results, and it declined to reexamine its Certification Decision. Order at 1. The Board then addressed Media General's contention that only Lodge 10 had demanded bargaining rights, and that the International had never made a bargaining demand. On this point, the Board

found that "even if the February 15, 2001 letter was not, in itself, a sufficient demand by the International, the refusal-to-bargain charge filed by the International on April 2, 2001, which referred to that letter, clarified any ambiguity as to which entity was requesting bargaining." *Id.* at 2. Accordingly, the Board concluded that Media General's refusal to bargain with the International violated sections 8(a)(1) and 8(a)(5) of the Act, and it ordered Media General to bargain with the International. *Id.* at 3. On April 23, 2003, Media General filed a motion for a stay of the Order, along with a motion for reconsideration. On May 8, 2003, both motions were denied.

The Board thereafter applied to this Court for enforcement of the Order, and Media General has cross-petitioned for our review thereof. We possess jurisdiction pursuant to sections 10(e) and (f) of the Act. *See* 29 U.S.C. § 160(e), (f).

II.

The Board's conclusion that an election resulted in a fair vote for union representation is a discretionary matter, and we are obliged to accord it great deference. NLRB v. Columbia Cable TV Co., Inc., 856 F.2d 636, 638 (4th Cir. 1988). We presume a Board-supervised election to be valid, and we may overturn such an election only if the Board has clearly abused its discretion. NLRB v. Maryland Ambulance Servs. Inc., 192 F.3d 430, 433 (4th Cir. 1999); Case Farms of North Carolina, Inc. v. NLRB, 128 F.3d 841, 844 (4th Cir. 1997). A party seeking to overturn an election "bears a heavy burden" and "must prove by specific evidence not only that campaign improprieties occurred, but also

that they prevented a fair election." Elizabethtown Gas Co. v. NLRB, 212 F.3d 257, 262 (4th Cir. 2000). The Act requires that we treat as conclusive any Board findings that are "supported by substantial evidence on the record considered as a whole ...." 29 U.S.C. § 160(e).

III.

In its opposition to the Board's application for enforcement and in its cross-petition for review, Media General maintains that the Board erred in ordering it to bargain with the International. In support of this contention, Media General asserts: (1) that circulation of the Vote Yes Petition "intimidated, threatened, and coerced employees" into voting "yes" for representation by the International; (2) that the Vote Yes Petition contained a forgery; (3) that the Board should have accorded Media General an evidentiary hearing before making its Certification Decision; and (4) that, if certification was proper, the International failed to make a proper bargaining demand. We address these contentions in turn.

A.

Media General first asserts that the Certification Decision constituted an abuse of discretion because the International had "intimidated, threatened, and coerced" employees into signing the Vote Yes Petition and into ultimately voting for representation by the International. Accordingly, Media General contends that it is under no duty to recognize the International as the exclusive collective-bargaining representative of the employees in the bargaining unit. We are obliged to reject this contention.

1.

As an initial matter, we reject Media General's suggestion that vote yes petitions are *per se* coercive. As the Sixth Circuit has explained, "although pre-election polling by an employer is *per se* objectionable, a union seeking to represent employees has a different relationship to them that makes pre-election polling less coercive." Maremont Corp. v. NLRB, 177 F.3d 573, 578 (6th Cir. 1999) (citing Kusan Mfg. Co. v. NLRB, 749 F.2d 362, 364 (6th Cir. 1984)). The proper inquiry is whether circulation of the Vote Yes Petition, under the circumstances leading to this election, interfered with the free and fair choice of the employees. *See id.;* Van Leer Containers, Inc. v. NLRB, 841 F.2d 779, 785 (7th Cir. 1988); Nu Skin Int'l, 307 N.L.R.B. 223, 223 (1992).

Contrary to Media General's contention, the Supreme Court's decision in NLRB v. Savair Manufacturing Co., 414 U.S. 270, 38 L. Ed. 2d 495, 94 S. Ct. 495 (1973), does not mandate a finding that vote yes petitions are inherently coercive. In *Savair*, the union had circulated recognition slips reflecting the names of the employees who had agreed to support it. Id. at 272. As incentive for signing these slips prior to the election, the union had offered to waive the employees' union initiation fees. Id. at 273. In finding this practice objectionable, the Court recognized that an employee's "outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union ...." Id. at 277. As we have explained, however, "the linchpin of *Savair* is the linkage between the offer to waive the initiation fee and a pre-election commitment to support the union. It is this linkage that constitutes the union's impermissible

interference in the election." NLRB v. VSA, Inc., 24 F.3d 588, 593 (4th Cir. 1994) (citing Savair, 414 U.S. at 275-78). Here, the International made no offer to waive the union fees or dues of signing employees, and the Savair decision is easily distinguishable.

2.

Turning to the facts relating to this election, Media General contends that two remarks made by an International representative at a meeting with the employees in the proposed bargaining unit - "I want everyone to sign this" and "this is where you separate the men from the boys" - rendered a fair election impossible. In support of this contention, Media General relies on the subjective reactions of two of those employees, who stated that they "felt pressure to sign the petition." The Board found, however, that these employee statements failed to establish that the free choice of a reasonable employee would have been hindered, and we are unable to disagree with that finding.

First of all, the "subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." Kmart Corp., 322 N.L.R.B. 1014, 1015 (1997). As one of our sister circuits has explained, the test for coercion is an objective one, and the relevant question is "whether the alleged misconduct is of a type that would cause interference with the free choice of a reasonable employee." AOTOP, LLC v. NLRB, 356 U.S. App. D.C. 283, 331 F.3d 100, 104 (D.C. Cir. 2003) (affirming Board's finding that union agent did not engage in objectionable conduct when she advised employees that they "had to" vote for

union). Furthermore, the responsibility for assessing the relevant facts and deciding whether the union's conduct interfered with a reasonable employee's free and fair choice in a representation election lies with the Board. *Id.*

Secondly, we have recognized that election campaigns, by their nature, are rough and tumble affairs, and they typically involve elements of pressure or inducement. *See, e. g.*, VSA, 24 F.3d at 595 (upholding union's offer to waive union initiation fees if union won election as permissible campaign tactic, where offer applied equally to all employees). And, "while '[c] oercive conduct is never condoned during the election process ...the Board will not set aside an election unless an atmosphere of fear and coercion rendered free choice impossible.'" *Id.* (quoting NLRB v. Herbert Halperin Distrib. Corp., 826 F.2d 287, 290 (4th Cir. 1987)); *see also* NLRB v. Coca-Cola Bottling Co., 132 F.3d 1001, 1003 (4th Cir. 1997) (" An election is by its nature a rough and tumble affair, and a certain amount of 'exaggerations, hyperbole, and appeals to emotions are to be expected.'") (citations omitted)).

In the circumstances of this dispute, the Regional Director found that a reasonable employee would not have felt coerced into voting for the International. n8 His finding on this point is amply supported for at least two reasons: (1) Media General officials spoke to those employees who had expressed concern about signing the Vote Yes Petition, and those officials explained that the "petition meant nothing" and that the employees could still vote "NO" in the election; and (2) after learning about the Vote Yes Petition, Media General circulated the Company Memorandum to all employees

in the proposed bargaining unit, explaining that they had the right to vote against representation in the election. n9 Accordingly, the Board's determination that the employees in the proposed bargaining unit were not coerced into supporting the International was supported by substantial evidence.

B.

Media General next contends that the Vote Yes Petition containeda forgery that requires the representation election at Mechanicsville to be set aside. As the Board found, however, this contention must also be rejected.

In support of its initial objections to the election result, Media General submitted the affidavit of Director Barker, who had performed "a visual inspection" of the Vote Yes Petition, stating his view that the *printed* name, "Richard G. Tingler," appeared to have been written by two different persons - the "Richard G. T" portion being written by one person, and the last six printed letters, the "ingler" portion thereof, being written by another person. The Regional Director rejected this claim in his Report on Objections, observing that (1) Director Barker was not a handwriting expert; (2) Media General had failed to produce any samples of Richard Tingler's handwriting; and (3) review of other available materials indicated that Tingler's name was printed by him. Media General, 338 N.L.R.B. No. 126, Case 5-RC-15077, at 9 (Nov. 16, 2000).

In its motion for reconsideration, Media General abandoned its initial claim that Tingler's *printed* name

was a forgery. It then acknowledged that "Mr. Tingler's hand-printed name on the petition is identical to the examples of Mr. Tingler's hand-printed name supplied" with the reconsideration request. Media General's second forgery theory on Tingler, as presented in its motion for reconsideration, was that William Slayton's signature, in the right-hand column next to Tingler's printed name, was a forgery of Tingler's signature. Rejecting this contention, the Regional Director, in his Order Denying Reconsideration, observed that it was "obvious" from the face of the Vote Yes Petition that "William B. Slayton signed his name in cursive in the space next to where Richard Tingler signed his name in printed form." Media General, 338 N.L.R.B. No. 126, Case 5-RC-15077 (Dec. 27, 2000). That is, Slayton did not forge Tingler's signature; he signed his own name in the right-hand column of the Vote Yes Petition, immediately to the right of Tingler's printed name.

Seeking to utilize these findings of the Regional Director in support of its contention on Tingler and the forgery claim, Media General now asserts that the Region's handling of its two forgery theories has been inconsistent. More specifically, it now asserts: Region 5 conducted a six (6)-week investigation to declare, initially, that the signature on the right column that corresponded to Tingler's printed name was unquestionably Tingler's signature. On reconsideration, after receiving copies of Tingler's signature, Region 5 declared that the signature was unquestionably *not* Tingler's signature. This explicit inconsistency alone entitled *Richmond Times-Dispatch* to a re-running of the election.

Contrary to Media General's assertions, the Regional

Director, in his Report on Objections, did not conclude that the signature next to Tingler's printed name was that of Richard Tingler. Although he referred to a "signature," the Regional Director was addressing Media General's initial theory about Tingler's *printed* name being forged. By contrast, the Regional Director, in his Order Denying Reconsideration, was responding to Media General's second forgery theory, concerning whether Slayton's *signed* name was a forgery of Tingler's *signed* name. These separate findings, responding to the alternative theories presented by Media General, are not inconsistent with one another, and we agree with the Board that there was no forgery apparent on the face of the Vote Yes Petition. n10

C.

Media General next contends that the Board erred in failing to conduct a hearing on Media General's objections to the International's pre-election conduct. On this point, we have explained that "precertification evidentiary hearings are necessary only if there are substantial and material issues of fact relating to the validity of the election." VSA, 24 F.3d at 596 (citing Columbia Cable, 856 F.2d at 639; NLRB v. Hydrotherm, 824 F.2d 332, 335 (4th Cir. 1987); NLRB v. Bata Shoe Co., 377 F.2d 821, 825 (4th Cir. 1967))). In deciding whether "substantial and material issues" exist, the allegations of the objecting party are to be accepted as true; however, an objecting party's disagreement with the inferences or interpretations placed on the findings of the Board does not mean that a pre-certification evidentiary hearing should have been conducted. Id. at 597-98 (citations omitted).

In support of this contention, Media General submitted, and the Regional Director accepted as true, the affidavits of certain employees in the proposed bargaining unit. Those affidavits reflected statements made by an International agent and set forth the affiants' subjective feelings of pressure to vote for representation. Accepting those affidavits as true, the Regional Director nevertheless found no coercion or interference with the employees' free choice. Additionally, he found no validity in Media General's contention that Richard Tingler's printed name was written by two different individuals. In denying Media General's motion for reconsideration, the Regional Director reviewed these assertions a second time. He then reaffirmed his finding of no coercion and rejected Media General's second forgery theory. Finally, the Board, by its Certification Decision, adopted the Regional Director's findings and recommendations and certified the election.

In sum, Media General now contends that the Board *should have* ruled in its favor, and that it abused its discretion in not granting a pre-certification evidentiary hearing. n11 This contention simply constitutes a disagreement with the Board's factual findings, and it does not warrant a pre-certification evidentiary hearing. *See* VSA, 24 F.3d at 598.

The Sixth Circuit's decision in NLRB v. Gormac Custom Manufacturing Co., 190 F.3d 742, 749 (6th Cir. 1999), relied on by Media General, is readily distinguishable. In *Gormac*, the union had circulated a vote yes petition in the employer's offices three hours before the election, and the court ruled that the Board had abused its discretion in denying a pre-certification

hearing. Id. at 751. In *Gormac*, there was a disputed issue of material fact on whether union officials had promised employees that their signing of the Vote Yes Petition would be confidential. *Id.* There is no such disputed issue here. The employees in the proposed bargaining unit were not promised confidentiality; in fact, the Vote Yes Petition stated on its face that "we AUTHORIZE the IAM to use this petition THROUGH ANY METHOD to urge our co-workers to vote YES."

In these circumstances, the Board did not abuse its discretion in failing to conduct a pre-certification evidentiary hearing.

D.

Finally, Media General contends that, even if the Certification Decision was appropriate, the International failed to validly request bargaining with Media General. It premises this contention on the fact that the February Letter was sent to Media General by Local 10 rather than by the International.

As we have acknowledged, a local union affiliate, for purposes of the exclusivity of bargaining requirement, is an entity separate and distinct from its international parent. United Elec., Radio & Mach. Workers (UE) v. NLRB, 986 F.2d 70, 75 (4th Cir. 1993). Accordingly, in *UE*, we upheld the Board's decision that an employer was not required to bargain with either the international or its local affiliate when the employer was confused about whether the demand came from the union's local affiliate, which was certified, or from the parent international union, which was not certified. Id. at 76. As Judge Wilkinson explained, an employer has

"a negative duty to bargain with no other entity than the certified bargaining representative. ... The Company thus risked committing an unfair labor practice if it negotiated with a labor organization other than the properly affiliated [certified union]." Id. at 75.

Media General contends that, because it was required to bargain only with the certified International, and the February Letter came from Local 10, legitimate confusion arose as to which entity had demanded bargaining. In NLRB v. Williams Enterprises, Inc., 50 F.3d 1280, 1287 (4th Cir. 1995), we held that an inadequate request to bargain (a telephone call by a union agent), plus the filing of an unfair labor practice charge, constituted a valid bargaining demand. As we explained, "'[a] valid request to bargain need not be made in any particular form, or *in haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees.'" Id. at 1286 (quoting Stanford Realty Assocs. v. NLRB, 306 N.L.R.B. 1061, 1066 (1992)). In this instance, the February Letter, standing alone, may have constituted an inadequate bargaining request, but it did not stand alone. The Board found that any ambiguity as to which entity was requesting to bargain for the employees at Mechanicsville was clarified when the International filed its unfair labor practice charge against Media General on April 2, 2001, adopting the February Letter. The International there stated that it had "requested negotiations" on February 15, 2001, and that Media General had "declined *our request* on March 13, 2001" (emphasis added). The Board's finding on this point is supported by substantial evidence, and it is therefore conclusive. Pursuant thereto, this contention must also be rejected.

IV.

Pursuant to the foregoing, we grant the Board's application for enforcement and deny Media General's cross-petition for review.

APPLICATION FOR ENFORCEMENT GRANTED AND

CROSS-PETITION FOR REVIEW DENIED

Footnotes

n1 Pursuant to the Stipulated Election Agreement, the bargaining unit consisted of all of Media General's full-time and regular part-time maintenance machinists, HVAC technicians, electro-mechanical technicians, electronic technicians, maintenance utility workers, maintenance mechanics, electrical technicians, and facilities systems technicians, who worked in the Mechanicsville production facility.

n2 The applicable regulations provide that "if objections to the conduct of an election are filed within 7 days after the tally of ballots has been prepared, the Regional Director ...conducts an investigation and rules on the objections." 29 C.F.R. § 101.19(a)(4). The Board's Region 5, which includes the Old Dominion, had an Acting Regional Director in place when Media General filed its objections to the election. By November 28, 2000, when Media General sought reconsideration by Region 5, a Regional Director had been appointed. For our purposes, we refer to the Acting Regional Director and Regional Director as the "Regional Director."

n3 The theory that Richard Tingler's printed name was written by two persons initially came from an affidavit executed by Director Barker, who asserted that his "visual inspection of the document quickly confirms this."

n4 An investigation of an alleged unfair labor practice is initiated by filing a charge with the Regional Director for the Board Region in which the alleged violation occurred. 29 C.F.R. § 101.2.

n5 Pursuant to section 8(a)(1) of the Act "[i] t shall be an unfair labor practice for an employer M to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 157 of this title ...." 29 U.S.C. § 158(a)(1). Under § 157 of Title 29:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... *Id.* § 157.

Section 8(a)(5) of the Act provides that "it shall be an unfair labor practice for an employer - to refuse to bargain collectively with the representatives of his employees ...." *Id.* § 158(a)(5).

n6 The regulations provide that "if the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the Regional Director institutes formal action by issuance of a complaint and notice of hearing." 29 C.F.R. § 101.8.

n7 The General Counsel of the Board is responsible for prosecuting complaints before the Board. 29 U.S.C. § 153(d).

n8 In his Order Denying Reconsideration, the Regional Director stated as follows:

[The] actions of the [International] did not involve inducements or coercion. ...Although some employees may have been influenced to sign the petition by the group dynamic or even a feeling of peer pressure, and then have had second thoughts about having done so, there is no requirement that such employee petitions be signed in solitary sanctity such as accompanies the marking of ballots in a Board-conducted election. As the Employer correctly explained to employees in its September 20 memorandum, the petition, "means nothing"; voters have the "absolute right" to vote "yes" or "no" in the Board-conducted secret ballot election regardless of whether they signed the petition. *Media General*, Case 5-RC-15077 (Dec. 27, 2000).

n9 We also find meritless Media General's convoluted contention that the Vote Yes Petition "was circulated to ensure that management saw it," as part of the International's "calculated strategy of coercion" and as a "first step" toward causing Media General to discriminate against International supporters. Nothing in the record suggests that the International circulated the Vote Yes Petition to ensure that Media General would discriminate against International supporters. And in signing the Vote Yes Petition, the employees authorized the International to "use the petition THROUGH ANY METHOD to urge [their] co-workers to vote YES."

n10 Equally unavailing is the suggestion that employees in the proposed bargaining unit were misled by Richard Tingler's printed name on the Vote Yes Petition - believing that he had signed it, when in fact he had not. This contention, similar to the contention that the appearance of twenty names on the face of the Vote Yes Petition constituted a misrepresentation because only sixteen employees actually voted for representation, is untenable. As we have explained, the Board considers employees to be "' mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.'" Case Farms of North Carolina, Inc. v. NLRB, 128 F.3d 841, 844 (4th Cir. 1997) (quoting Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 132 (1982) (quoting Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1313 (1977))).

The Regional Director concluded that the employees in the proposed bargaining unit could recognize the obvious: that William Slayton signed his name in the column next to Richard Tingler's name. Furthermore, the employees were informed by the Company Memorandum that signing the Vote Yes Petition did not require an employee to vote in favor of representation. Accordingly, the appearance on the Vote Yes Petition of names of employees who may not have voted for representation is not misleading. If anything, it demonstrates that employees felt free to vote "no" in the election even though they had subscribed to the Vote Yes Petition.

n11 Media General suggests that, because the election was decided by a close vote, it was necessarily entitled to a pre-certification evidentiary hearing. We agree that closer scrutiny is warranted when an election is

decided by a close vote. *See* Savair, 414 U.S. at 278 (applying stricter scrutiny when one vote would have altered election's outcome). We have examined each of Media General's contentions carefully and with strict scrutiny, however, and as we observed in *VSA*, "even close scrutiny here discloses no abuse of discretion by the Board in ...not granting [the employer] an evidentiary hearing." VSA, 24 F.3d at 598 n. 22.

Case 5-CA-29619

NATIONAL LABOR RELATIONS BOARD

Media General Operations, Inc. d/b/a Richmond Times-Dispatch and International Association of Machinists and Aerospace Workers, AFL-CIO.

March 28, 2003

DECISION AND ORDER

By Robert J. Battista, Chairman; Wilma B. Liebman, Member; Peter C. Schaumber, Member

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

This is a refusal-to-bargain case in which the Respondent seeks to contest the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 2, 2001, the Acting General Counsel of the National Labor Relations Board issued the complaint on April 16, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 5-RC-15077. (Official notice is

taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On May 11, 2001, the Acting General Counsel filed a Motion for Summary Judgment. On May 16, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response to the Notice to Show Cause.

In addition, on June 6, 2001, the Respondent filed a Motion for Summary Judgment in reply to the General Counsel's motion. The General Counsel filed an opposition to the Respondent's motion on June 22, 2001. The Respondent then filed a reply in support of its motion on June 28, 2001, and the General Counsel filed a response to the Respondent's reply on July 16, 2001.

Ruling on Motion for Summary Judgment

In its answer the Respondent attacks the validity of the certification on the basis of its objections to the election in the representation proceeding. n1

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation

proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). n2

In its reply Motion for Summary Judgment, the Respondent contends that it cannot be found to have violated Section 8(a)(5) and (1) of the Act because the certified Union, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM or International Union or the Union) has never made a request to bargain of the Respondent. n3 The Respondent argues that the only demand to bargain addressed to the Respondent has been made by Richmond Lodge No. 10 of the IAM (Lodge 10), which is a separate and distinct entity from IAM and is not the certified bargaining representative. The Respondent asserts that it has never been under a duty to bargain with Lodge 10, and because a certified bargaining representative has made no demand to bargain, the Respondent cannot be found to have unlawfully refused to bargain in this proceeding. For the reasons set forth below, we reject the Respondent's contention and find that it has failed to raise any material factual issue warranting a hearing regarding whether a valid bargaining demand has been made.

The undisputed facts show that by a letter dated February 15, 2001, a business representative for Lodge 10 requested the Respondent to provide information and to propose dates for bargaining "relative to the IAM bargaining unit." By letter to Lodge 10 dated March 13, 2001, the Respondent stated that ". . . in response to your letter dated February 15, 2001 . . .

please be advised . . . that the Richmond-Times Dispatch declines to recognize or bargain with your union." On April 2, 2001, the certified International Union filed the instant unfair labor practice charge, alleging, inter alia, as follows:

Since on or about March 13, 2001, and at all times thereafter, the Employer . . . has refused to bargain in good faith with the International Association of Machinists and Aerospace Workers, AFL-CIO, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining. . .

The NLRB conducted an election that resulted in the Petitioner receiving a majority of the vote and . . . the NLRB issued a Certification of Representative on January 24, 2001. On February 15, 2001, the Petitioner requested negotiations begin (Enclosure 1) and the Employer declined our request on March 13, 2001 (Enclosure 2).

Based on the foregoing, we reject the Respondent's contention that the International Union never made a bargaining demand. We find that even if the February 15, 2001 letter was not, in itself, a sufficient demand by the International Union, the refusal-to-bargain charge filed by the International Union on April 2, 2001, which referred to that letter, clarified any ambiguity as to which entity was requesting bargaining. Thus, as stated above, IAM's charge clearly alleged that on February 15, 2001, the date of the Lodge 10 letter, negotiations were requested and that on March 13, 2001, the Respondent denied "our request." Therefore, we find that the charge, together with the letter, constituted a

valid demand for bargaining by the International Union. See *Parkview Manor*, 321 NLRB 477 (1996) (finding that unfair labor practice charge filed by certified local, together with letter sent by affiliated labor organization, constituted valid demand for bargaining), citing *Williams Enterprises*, 312 NLRB 937, 938-939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995).n4

Accordingly, we grant the General Counsel's Motion for Summary Judgment, deny the Respondent's Motion for Summary Judgment, and will order the Respondent to bargain with the Union.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Mechanicsville, Virginia, has been engaged in the publication of the Richmond Times-Dispatch, a daily newspaper. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $ 200,000, subscribed to various interstate news services, including the Associated Press, and advertised various nationally sold products valued in excess of $ 5000 directly from points outside the Commonwealth of Virginia. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held September 22, 2000, the Union was certified on January 24, 2001, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time maintenance machinists, HVAC technicians, electro mechanical technicians, electronic technicians, maintenance utility workers, maintenance mechanics, electrical technicians and facilities systems technicians employed by the Employer at its Hanover County, Mechanicsville, VA facility; but excluding all other employees, office clerical employees, professional and managerial employees, watchmen and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since April 2, 2001, the Union has requested the Respondent to bargain, and the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after April 2, 2001, to bargain with the Union as the exclusive collective-bargaining

representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Media General Operations, Inc. d/b/a Richmond Times-Dispatch, Mechanicsville, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Association of Machinists and Aerospace Workers, AFL-CIO, as

the exclusive bargaining representative of the *employees in the bargaining unit.*

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time maintenance machinists, HVAC technicians, electro mechanical technicians, electronic technicians, maintenance utility workers, maintenance mechanics, electrical technicians and facilities systems technicians employed by the Employer at its Hanover County, Mechanicsville, VA facility; but excluding all other employees, office clerical employees, professional and managerial employees, watchmen and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mechanicsville, Virginia, copies of the attached notice marked "Appendix." n5 Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time maintenance machinists, HVAC technicians, electro mechanical technicians, electronic technicians, maintenance utility workers, maintenance mechanics, electrical technicians and facilities systems technicians employed by us at our Hanover County, Mechanicsville, VA facility; but excluding all other employees, office clerical employees, professional and managerial employees, watchmen and guards and supervisors as defined in the Act.

MEDIA GENERAL OPERATIONS, INC. d/b/a RICHMOND TIMES-DISPATCH

Footnotes

n1 The Respondent's answer also raises as an affirmative defense the argument that the instant complaint must be dismissed because it failed to set a time and place for a hearing within 5 days after its issuance. The Respondent raised this same contention in its motion to dismiss complaint for noncompliance with the Statute that it filed with the Board on April 27, 2001. In an unpublished Order dated May 23, 2001, the Board denied the Respondent's motion to dismiss as lacking in merit. The Board found that the absence of a notice of hearing was not prejudicial, stating: "At this time, it is not clear that there will be issues of fact warranting a hearing." For the reasons set forth infra, we now find that a hearing is not warranted in this proceeding because there are no material facts in dispute. Accordingly, we again conclude that the Respondent was not prejudiced by the Region's failure to state a time and place for a hearing.

n2 Chairman Battista and Member Schaumber did not participate in the underlying representation proceeding. However, they agree that the Respondent has not cited any new evidence or special circumstances warranting a hearing in this proceeding and that summary judgment is appropriate.

n3 The Respondent's answer also denies that the Union requested bargaining and that it refused this request.

n4 *Newell Porcelain Co.*, 307 NLRB 877 (1992), petition for review denied sub nom. *Electrical Workers UE v. NLRB*, 986 F.2d 70 (4th Cir. 1993), relied on by the Respondent, is distinguishable. In *Newell Porcelain*, a

company obligated to bargain with a newly-certified union made a good faith, albeit unsuccessful, effort during negotiations to ascertain that it was in fact negotiating with that union, and was held justified in suspending negotiations pending clarification of the identity of the party with which it was negotiating. By contrast, the Respondent here made no attempt to clarify the asserted ambiguity and ascertain the relationship between Lodge 10 and the International Union.

n5 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

No. 03-1469
5-CA-29619

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a Richmond Times-Dispatch
Respondent

No. 03-1566
5-CA-29619

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a Richmond Times-Dispatch
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

Filed May 4, 2004

On Petition for Rehearing En Banc

The respondent's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for Judge Widener, Judge King, and Judge Bennett.

For the Court,

/s/ Patricia S. Connor
CLERK

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BEST AVAILABLE COPY

WE ARE VOTING YES!

We, the undersigned employees of TIMES DISPATCH located in, Richmond, Virginia hereby authorize the International Association of Machinists and Aerospace Workers (IAM) to represent us in collective bargaining with our employer.

We have made a commitment and promise to ourselves, each other, and to the IAM to vote YES! WE WILL NOT fall for the company's scare tactics!

Furthermore, we AUTHORIZE the IAM to use this petition THROUGH ANY METHOD to urge our co-workers to vote YES.

WE WILL NOT CHANGE OUR MINDS!

WE WILL STAND BY OUR WORD!

WE WILL VOTE YES!

Print/Sign Name (Same Line)	Print/Sign Name (Same Line)
[illegible]	[illegible]
Larry Wells	Larry Wells
[illegible]	[illegible]
Roger Mitchell	Roger Mitchell
[illegible]	[illegible]

MARK ACREE	
Akara Licence	
Stuart M Speers	
Ed Crawford	
Michael A. Belvin	
Jim Templeman	
Bill Rose	
Shirley Nelson	
Leroy Anderson III	
Richard D. Jones	

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WE WILL NOT CHANGE OUR MINDS!

WE WILL STAND BY OUR WORD!

WE WILL VOTE YE

Print/Sign Name (Same Line)	Print/Sign Name (Same Line)
Gary M. Davis	
Richard B. Taylor	
Joseph C. Fackovec	
Wilbur D. Slayton	
Thomas L. Wingo	

42a

DO NOT WRITE IN THIS SPACE	
Case 5-CA-29619	Date Filed 4/02/2001

United States of America
National Labor Relations Board
CHARGE AGAINST EMPLOYER

INSTRUCTIONS
File an original together with four copies and a copy for each additional charged party named in Item 1 with the NLRB Regional Director for the region in which the alleged Unfair labor practice occurred or is occurring.

<table>
<tr><td colspan="3">1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</td></tr>
<tr><td colspan="2">a. Name of Employer
MEDIA GENERAL OPERATIONS, INC. d/b/a RICHMOND TIMES DISPATCH</td><td>b. Number of workers employed
Approx 27</td></tr>
<tr><td>c. Address (Street, city, state and ZIP code)
8460 TIMES DISPATCH BLVD.
MECHANICSVILLE, VA 23293
(P.O. BOX 85333, RICHMOND, VA 23293)</td><td>d. Employer Representative
ALBERT T. AUGUST III
PRESIDENT & GENERAL MANAGER</td><td>Telephone No.
(804) 649-6000
Fax No.</td></tr>
<tr><td>f. Type of Establishment (factory, mine, wholesaler, etc.)
NEWSPAPER</td><td colspan="2">g. Identify principal product or service
NEWSPAPERS</td></tr>
</table>

h. The above names employer has engages in and is engaging in unfair labor practives within the meaning of section 8(a), subsections (1) and (list subsections) 8(a)(1) & (5) of the National Labor Relations Act and these unfair labor practices are practices affecting commerce within the meaning of the Act.

2. Base of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months, the above-named Employer, through its officers, agents and representatives, has interfered with, restrained and coerced, and is interfering with, restraining and coercing employees of Media General Operations, Inc. d/b/a Richmond Times-Dispatch in the exercise of their rights guaranteed in Section 7 of the Act.

Since on or about March 13, 2001 and at all time thereafter, the Employer, by its officers, agents, and representatives, has refused to bargain in good faith with the International Association of Machinists and Aerospace Workers, AFL-CIO, a labor organization chosen by a majority of its employees in a n appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The NLRB conducted an election that resulted in the Petitioner receiving a majority of the vote and, after much delay b the Employer's attorney, the NLRB issued a Certification of Representative on January 24, 2001. On February 15, 2001, the Petitioner requested negotiations begin (Enclosure 1) and the Employer declined our request on March 13, 2001 (Enclosure 2).

3. Full name of party filing charge (if labor organization, give full name, including local name and number) INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO	
4a. Address (street and number, city, state, and ZIP code) 1111 W. MOCKINGBIRD LANE, SUITE 1357, DALLAS, TX 75247	4b. Telephone No. (214) 638-6092
5. Full name of party filing charge (if labor organization, give full name, including local name and number) INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO	

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By /s/
(signature of representative or person making charge)
Thomas C. Daves, Grand Lodge Representative
(Print/Type name and title or office, if any)

Address 1111 W. Mockingbird Lane, Suite 1367
Dallas, TX 75247

Telephone No. (214) 638-6543
Facsimile No. (214) 638-6092

Date March 26, 2001

RICHMOND LODGE No. 10
INTERNATIONAL ASSOCIATION OF
MACHINISTS and AEROSPACE WORKERS

MACHINISTS BLDG, 3204 CUTSHAW AVE,
RICHMOND, VA 23230-5010

OFFICE OF THE
BUSINESS
REPRESENTATIVE

PHONE (804) 359-4058
FAX (804) 355-8058

February 15, 2001

Mr. Albert T. August, III
President & General Manager
Richmond Times Dispatch
P.O. Box 85333
Richmond, Virginia 23293

Dear Mr. August:

We are requesting the following preliminary date relative to the IAM bargaining unit which we feel is essential to bargain intelligently on the issues of wages and working conditions in the forthcoming negotiations. Please forward this data to me as soon as possible.

The data outlined below can be if you wish be provided in an electronic version on 3 1/2' diskettes in a format compatible with an IBM-type personal computer. The preferable format is a spreadsheet program such as Excel. If this program is not available, please provide the data in a delimited text format or comma separate variable format. A hard copy of the files showing this data, including field layout, is also required.

The data needed is as follows:

I. A detailed breakdown of labor costs and hours for bargaining unit employees for the two most recent years, including:

a) total straight-time pay and total hours worked

b) total overtime pay and total number of overtime hours worked

c) totals for the different types of differential pay and total number of hours worked by type of differential (such as holiday, shift, and skill differentials)

d) totals for the different types of paid time off and number of hours of paid time for holidays, vacations, sick leave, bereavement, and any other paid time off

e) total payments by category for labor costs outside the payroll (such as pensions, medical insurance, dental insurance, vision insurance, life insurance, cash bonuses, profit/productivity sharing payments, etc.)

f) a breakdown for any insurance premiums (such as medical, dental, vision, life, accident, etc.) by type of coverage (such as single, one dependent, family, etc.), including details on per employee premium costs, number of employees by type of coverage, and any employee share of these insurance premiums, and

g) information by type and coverage for any insurance premiums for retirees.

NOTE: THE ATTACHED TABLES (SAMPLE 1 AND SAMPLE 2) SHOW THE GENERAL FORMAT FOR ITEMS I(a)-I(g). PLEASE NOTE THAT FOR THE VARIOUS HELATH INSURANCE BENEFITS, WE NEED A BREAKDOWN BY CARRIER AND BY TYPE OF COVERAGE. PLEASE STATE WHAT METHOD YOU ARE

USING IN MATCHING PAYROLL EXPENSES AND HOURS WORKED.

II. A current, detailed breakdown by bargaining unit named employee for the two most recent years showing the following:

a) pay/occupation grade Or Level (i.e. pay grade 5)
b) job title
c) straight-time hourly rate for each named employee
d) earnings as reported on W-2 (including any pre-tax deferrals)
e) shift primarily assigned to
f) age
g) seniority
h) gender
i) indicate if he/she is part-time

NOTE: THE ATTACHED TABLE (SAMPLE 3) SHOWS THE GENERAL FORMAT FOR ITEMS II(a)-II(i).

III. For the entire bargaining unit for the two most recent years:

a) total number of employees, average hourly rate, average seniority, and average age
b) number of employees and average wage by pay/occupational level
c) number of employees and average differential by each shift, skill, premium, or other differential
d) number of employees at each level of the vacation schedule
e) average number of days used per bargaining unit member for sick leave, personal days, jury duty, bereavement leave, military leave

f) average annual cost to the employer per employee for pension, health care, life insurance, accidental death and dismemberment, and each other type insurance or benefit

g) average hours of overtime worked per week per bargaining unit member

IV. For any pension, savings or stock plan:

a) Form 5500 and all supplements for the past three years

b) annual reports and actuarial reports for the past three years

c) the most current Summary Plan Descriptions

d) the most current plan documents, including all attachments and supplements, and

e) the most current IRS determination letter

f) for voluntary participation and/or contribution plans, such as 401(k) plans, the annual average for the past three years for:

1) the number of bargaining unit members participating

2) the average contribution by these participants

3) the number of these participants making the maximum contribution

4) the average employer match/contribution for these participants

5) formula used for determining the level of employer match/contributions

6) the number of these participants with loans from the plan

7) the percent of terminating plain participants rolling over plan assets into other types of tax-deferred savings plans

8) the number of participants taking early withdrawal with tax penalties

g) for defined benefit plans, a breakdown per retiree or beneficiary who started receiving a pension during the past three years:

1) date of service when employment with company terminated
2) age and seniority at date of termination
3) monthly benefit including calculation showing how benefit was determined
4) indication if pension was not a regular pension, such as disability, early retirement
5) indication of what type of pension selection, such as joint & survivor, 10-year certain, etc.

V. The most current Summary Plan Description for all other benefit plans not included in Section IV.

If there are any questions regarding the above request, please notify me as soon as possible at 804-359-4058.

Please notify us of the available dates that you may have to begin negotiations. The Union will be prepared any time after March 1, 2001.

Thank you in advance for your timely assistance.

Sincerely
/s/
Stephen W. Spain
Directing Business
Representative
Attachments
SWS:mm
cc: Mr. George Hooper, GVP, LAM
Mr. Roy Covington, GLR, IAM
Mr. William Eacho, BR, IAM

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A Media General Newspaper P.O. Box 9533
Richmond, Virginia 23293-0001 (804) 649-6000

Richmond Newspapers, Inc.

Albert T. August, III
President and General Manager

March 13, 2001

Certified Mail/Return Receipt Requested

Mr. Stephen W. Spain
Directing Business Representative
Richmond Lodge #10
3204 Cutshaw Avenue
Richmond, VA 23230-5010

Dear Mr. Spain:

This letter is in response to your letter dated February 15, 2001. Please be advised, with all due respect, that the Richmond Times-Dispatch declines to recognize or bargain with your union.

Sincerely,

/s/
Albert T. August, III
ATA/jmp

(2)

OFFICE OF THE CLERK

No. 04-154

In the Supreme Court of the United States

MEDIA GENERAL OPERATIONS, INCORPORATED, DBA RICHMOND TIMES-DISPATCH, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that the union's pre-election circulation of a petition signed by employees to express their support publicly for the union did not interfere with employee free choice in selecting the union as their bargaining representative, and therefore did not warrant setting aside the election.

2. Whether the National Labor Relations Board reasonably found that the union made a valid bargaining demand when it filed an unfair labor practice charge that clarified that an earlier request to bargain made by its local affiliate was made on the union's behalf.

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In the Supreme Court of the United States

No. 04-154

MEDIA GENERAL OPERATIONS, INCORPORATED, DBA RICHMOND TIMES-DISPATCH, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 360 F.3d 434. The decision and order of the National Labor Relations Board (Board) in the unfair labor practice proceeding (Pet. App. 25a-36a) is reported at 338 N.L.R.B. No. 126. The Board's underlying decision and certification of representative (App., *infra*, 1a-2a) is unreported. The regional director's order denying a motion for reconsideration (App., *infra*, 3a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2004. A petition for rehearing was denied on May 4, 2004 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on August 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner publishes the Richmond Times-Dispatch, a daily newspaper, and maintains a production facility in Mechanicsville, Virginia. Pet. App. 29a. Pursuant to a stipulated election agreement between petitioner and the International Association of Machinists and Aerospace Workers, AFL-CIO (Union or International Union), the Board conducted a secret-ballot election among petitioner's maintenance employees on September 22, 2000, which the Union won by a vote of 16 to 15. *Id.* at 3a, 6a.

On September 29, 2000, petitioner filed objections with the Board's acting regional director alleging, *inter alia*, that the Union had violated "established law" by circulating a "Vote Yes" petition among employees before the election. Pet. App. 6a.[1] Petitioner submitted affidavits alleging that, about nine days before the election, the Union began circulating the petition among the employees for their signature. *Id.* at 3a. The petition stated, in part, that the signing employees "have made a commitment * * * to vote YES" in the election, and "AUTHORIZE the [Union] to use this

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[1] Petitioner also alleged that the Union engaged in a variety of improprieties in the solicitation and circulation of the petition. See Pet. App. 6a, 12a-16a. The court of appeals rejected those contentions (see *id.* at 12a-16a), and petitioner has not renewed them in this Court.

petition THROUGH ANY METHOD to urge our co-workers to vote YES." *Id.* at 4a, 40a, 42a. The day before the election, the Union distributed throughout the workplace copies of the petition containing the signatures of 20 employees. *Id.* at 5a.

After conducting an investigation, the Board's acting regional director issued a report recommending that the Board overrule petitioner's objections. Pet. App. 6a. Petitioner filed a motion for reconsideration alleging that the Union had engaged in objectionable election conduct proscribed by *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, the Court held that a union engaged in objectionable conduct by inducing employees to sign recognition slips before an election by offering to waive initiation fees only for those employees who signed the slips. *Id.* at 277-281. The regional director denied the motion for reconsideration, explaining that *Savair* was inapplicable because "the actions of the Union did not involve inducements." App., *infra*, 4a. Moreover, the regional director noted that the Union had asked the employees to sign a petition that "on its face expressly authorized the Union to use it through any method to urge co-workers to vote yes." *Id.* at 5a.

Petitioner filed with the Board exceptions to the report and to the order denying reconsideration. On January 24, 2001, the Board adopted the findings of the report and the order denying reconsideration, overruled petitioner's objections, and certified the Union as the employees' exclusive bargaining representative. App., *infra*, 1a-2a; Pet. App. 7a, 30a.

2. On February 15, 2001, the Union's local affiliate, Richmond Lodge No. 10, sent petitioner a letter requesting information "relative to the IAM bargaining unit" and asking for available dates to begin bargaining.

Pet. App. 27a-28a, 46a-51a. On March 13, 2001, petitioner replied by letter stating that it would not "recognize or bargain with your union." *Id.* at 7a, 27a-28a. On April 2, 2001, the Union filed an unfair labor practice charge with the Board that stated:

> The NLRB conducted an election that resulted in [the Union's] receiving a majority of the vote and, after much delay b[y] the Employer's attorney, the NLRB issued a Certification of Representative on January 24, 2001. On February 15, 2001, the [Union] requested negotiations begin * * * and the Employer declined our request on March 13, 2001.

Id. at 44a. Acting on the charge, the Board's General Counsel issued a complaint alleging that petitioner's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5) and (1). Pet. App. 25a. Petitioner filed an answer in which it asserted that it was "under no duty to bargain with [the Union] as the certification election was tainted by [the Union's] objectionable conduct." *Id.* at 8a.

The Board granted summary judgment in favor of the General Counsel, finding that petitioner's refusal to bargain on and after April 2, 2001, violated the Act, and ordering petitioner to bargain with the Union. Pet. App. 26a-29a. The Board rejected petitioner's contention that the International Union had never made a bargaining demand. *Id.* at 28a. The Board found that, "even if the February 15 letter" from the local affiliate "was not, in itself, a sufficient demand by the International Union, the refusal-to-bargain charge filed by the International Union on April 2, 2001, which referred to that letter, clarified any ambiguity as to which entity was requesting bargaining." *Ibid.* The Board observed

that the Union's charge "clearly alleged" that the February 15 letter had requested that petitioner begin bargaining and that petitioner had declined "our request." *Ibid.* The Board concluded that "the charge, together with the letter, constituted a valid demand for bargaining by the International Union." *Id.* at 28a-29a. On April 23, 2003, petitioner filed a motion for reconsideration and a motion to stay the Board's order, both of which the Board denied. *Id.* at 9a.

3. The court of appeals enforced the Board's order and denied petitioner's cross-petition for review. Pet. App. 1a-24a.

a. The court rejected petitioner's contention that the "Vote Yes" petition was "inherently coercive" under *Savair*. Pet. App. 11a-12a. The court explained that "the linchpin of *Savair* is the linkage between the offer to waive the initiation fee and a pre-election commitment to support the union. It is this linkage that constitutes the union's impermissible interference in the election." *Ibid.* (quoting *NLRB* v. *VSA, Inc.*, 24 F.3d 588, 593 (4th Cir.), cert. denied, 513 U.S. 1041 (1994)). "Here," the court concluded, "the International made no offer to waive the union fees or dues of signing employees, and the [*Savair*] decision is easily distinguishable." *Id.* at 12a.

b. The court also rejected petitioner's contention that the Union did not make a valid bargaining demand. Pet. App. 18a-19a. The court noted that it had previously "held that an inadequate request to bargain (a telephone call by a union agent), plus the filing of an unfair labor practice charge, constituted a valid bargaining demand." *Id.* at 19a. The court explained that in this case, "the February Letter, standing alone, may have constituted an inadequate bargaining request, but it did not stand alone." *Ibid.* Rather, "the Board found

that any ambiguity as to which entity was requesting to bargain for the employees at Mechanicsville was clarified when the International filed its unfair labor practice charge against Media General on April 2, 2001, adopting the February Letter." *Ibid.* The court concluded that the "Board's finding on this point is supported by substantial evidence." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner errs in contending (Pet. 14-16) that the court of appeals' decision conflicts with *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). As noted, *Savair* held that a union engaged in objectionable election conduct by offering to waive the initiation fees for employees who signed recognition slips before the election. *Id.* at 277-281. The Court explained that "permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election" would allow "the union to buy endorsements and paint a false portrait of employee support during its election campaign." *Id.* at 277. "In addition," the Court noted, some employees, after accepting the inducement, "would feel obliged to carry through on their stated intention to support the union." *Id.* at 277-278.

The court of appeals correctly held *Savair* to be "easily distinguishable" from this case. Pet. App. 12a. Here, the Union did not offer employees an economic or other inducement to sign the "Vote Yes" petition. As the court explained, absent a linkage between an

inducement and a pre-election commitment to support the Union, the principles of *Savair* are not implicated.

Petitioner also contends (Pet. 14, 16) that the Board's decision in this case is "arbitrary and inconsistent" with the Board's "interpretation of *Savair*" in *Fermont*, 286 N.L.R.B. 920 (1987). Petitioner is barred from raising that claim in this Court because petitioner failed to urge such an objection before the Board and has alleged no "extraordinary circumstances" excusing its failure to do so. 29 U.S.C. 160(e); see *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Petitioner raised that issue for the first time in its reply brief in the court of appeals, and the court did not address it. See *United States* v. *Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004) (contentions not raised in the opening brief are abandoned).

In any event, the Board's decision is not inconsistent with *Fermont*. In *Fermont*, the employer sponsored a contest asking employees to "point out something good about [the employer] or why everyone should VOTE NEITHER" in the election between two unions. 286 N.L.R.B. at 920. Prizes included a 19-inch color television, a microwave oven, and a food processor. *Ibid.* On the morning of the election, the employer gathered the employees together, presented the entries, announced the winners, and asked the winners to come forward and receive their prizes. *Ibid.* "On this record," the Board found, "it is obvious that the [employer] was buying endorsements," as proscribed by *Savair*. *Ibid.*

Petitioner incorrectly asserts (Pet. 15-16) that the Board in *Fermont* recognized that a *Savair* violation may be found without an unlawful inducement and

based solely on employees' "sense of obligation to vote in accordance with expressed sentiments, be they an individual's sentiments, or the sentiments of a co-worker." Neither the holding of *Fermont* nor the language quoted by petitioner (Pet. 15) supports that assertion. To the contrary, the Board, relying on *Savair*, explained in the quoted language that it is the offer of economic inducements for pre-election support that gives rise to a false indication of support for the union and a sense of obligation on the part of some employees "to carry through on their stated intention to support the union." *Savair*, 414 U.S. at 278; see 286 N.L.R.B. at 920-921.

Indeed, after *Fermont*, the Board has continued to recognize that *Savair* applies only where there is an inducement in exchange for pre-election support. For instance, in *Nu Skin International, Inc.*, 307 N.L.R.B. 223 (1992), the Board found that there was no *Savair* violation where a union offered employees a "Union Yes" T-shirt if they signed a "Vote Yes" petition for the union's use in the election campaign. The Board concluded that the T-shirts "would not reasonably induce nonsupporters to sign the petition" because the T-shirts were "inexpensive items" that "would reasonably be desirable only to employees who favored the [u]nion and wanted to proclaim their prounion view." *Id.* at 223-224. See also *Keeler Die Cast* v. *NLRB*, 185 F.3d 535, 538-539 (6th Cir. 1999) (upholding Board's conclusion that *Savair* is inapplicable where no inducement was offered for signing a "Vote Yes" petition), cert. denied, 529 U.S. 1018 (2000). Accordingly, the court correctly upheld the Board's overruling of petitioner's election objection.

2. Petitioner argues (Pet. 17-27) that the court of appeals erred in holding that the Union made a valid

bargaining demand. That claim lacks merit and does not warrant review.

a. Section 8(a)(5) of the NLRA (29 U.S.C. 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." An employer's duty to bargain is triggered by the union's request for bargaining. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 52-53 (1987).[2] If the union's request is vague, ambiguous, or confusing, the Board may properly find that the union did not make a valid demand. See, *e.g.*, *United Elec. Workers* v. *NLRB*, 986 F.2d 70, 76 (4th Cir. 1993). Where an initial request is unclear, however, the Board, with court approval, has found that the employer's duty to bargain is subsequently triggered when the union files an unfair labor practice charge that clarifies the earlier request. See *RC Aluminum Indus., Inc.* v. *NLRB*, 326 F.3d 235, 243 (D.C. Cir. 2003); *NLRB* v. *Williams Enters., Inc.*, 50 F.3d 1280, 1286 (4th Cir. 1995).

Under those settled principles, the court of appeals correctly upheld the Board's finding that the unfair labor practice charge filed by the Union, together with the letter requesting bargaining previously sent by the Union's local affiliate, constituted a valid demand for

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[2] A "valid request to bargain need not be made in any particular form * * * so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees." *NLRB* v. *Williams Enters., Inc.*, 50 F.3d 1280, 1286 (4th Cir. 1995) (quoting *Stanford Realty Assocs., Inc.*, 306 N.L.R.B. 1061, 1066 (1992)). See also *Peters* v. *NLRB*, 153 F.3d 289, 299 (6th Cir. 1998); *NLRB* v. *Fosdal*, 367 F.2d 784, 788 (7th Cir. 1966); *Scobell Chem. Co.* v. *NLRB*, 267 F.2d 922, 925 (2d Cir. 1959); *Marysville Travelodge*, 233 N.L.R.B. 527, 532 (1977), enforced *sub nom. NLRB* v. *Cofer*, 637 F.2d 1309 (9th Cir. 1981).

bargaining by the Union. The Union's charge referred to the earlier letter and alleged that petitioner denied "our request" to bargain. Pet. App. 44a. In those circumstances, the court properly upheld the Board's determination that any ambiguity regarding which entity was requesting bargaining was clarified when the Union filed its unfair labor practice charge referencing the February 15 letter. See *id.* at 19a.

b. Contrary to petitioner's contention (Pet. 17-21, 24), the court of appeals' holding that the Union made a valid bargaining demand is not in conflict with the established principles that an international union and its local affiliate are separate and distinct labor organizations, that no automatic agency relationship exists between them, and that such entities are not interchangeable for purposes of an employer's recognition of an exclusive, certified bargaining representative. Indeed, the court correctly acknowledged that "a local union affiliate, for purposes of the exclusivity of bargaining requirement, is an entity separate and distinct from its international parent." Pet. App. 18a. The court also quoted its holding in *United Electrical Workers*, 982 F.2d at 75-76, that, under the facts in that case, "an employer was not required to bargain with either the international or its local affiliate when the employer was confused about whether the demand came from the union's local affiliate, which was certified, or from the parent international union, which was not certified." Pet. App. 18a. Petitioner's actual disagreement, therefore, is with the court's conclusion in this case that the Union was the entity requesting

bargaining.[3] That fact-bound disagreement does not warrant further consideration by this Court.[4]

Because the Union's unfair labor practice charge clarified that the local affiliate's bargaining request was on the Union's behalf, this case is distinct from cases cited by petitioner (Pet. 20-21) in which an uncertified union sought to "inject itself . . . into a labor relationship where there is a certification." *Newell Porcelain Co.*, 307 N.L.R.B. 877, 878 (1992) (citation omitted), enforced *sub nom. United Elec. Workers* v. *NLRB*, 986 F.2d 70 (4th Cir. 1993). In *Newell Porcelain*, the employer was asked to recognize an uncertified union, which refused to clarify that the demand was on behalf of the certified entity. 307 N.L.R.B. at 878. See *International Union, United Auto Workers* v. *NLRB*, 394

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[3] The Union's use of its local affiliate to send the initial letter on its behalf was neither inappropriate nor uncommon. See *CCI Constr. Co.*, 326 N.L.R.B. 1319, 1319 (1998) ("It is * * * well established that an exclusive [bargaining] representative 'is empowered to designate and authorize agents, including other labor organizations, to act on its behalf.'") (quoting *United States Postal Serv.*, 310 N.L.R.B. 391, 391 (1993)).

[4] Petitioner fails to acknowledge the Board's finding (Pet. App. 30a) that petitioner's refusal to bargain commenced only as of April 2, 2001, the date the Union filed the unfair labor practice charge. Because there is no finding that petitioner unlawfully refused to bargain solely on the basis of the February 15 letter, many of petitioner's arguments are wide of the mark. For example, this case does not implicate the issues of whether, prior to the filing of the unfair labor practice charge, the Union designated its local affiliate to bargain as its agent or notified petitioner of any such designation. See Pet. 20-22. For the same reason, there is no merit to petitioner's assertions (Pet. 26, 27) that the Board held that the charge "retroactively" put petitioner on notice of a delegation to the Union's local affiliate or that the Board's decision would require employers to risk violating the NLRA by bargaining with an uncertified entity.

F.2d 757, 760-761 (D.C. Cir.) (employer excused from bargaining with uncertified local union that formally requested recognition as the employees' exclusive bargaining representative, where international union was certified), cert. denied, 393 U.S. 831 (1968).

c. Petitioner errs in contending (Pet. 27) that the court of appeals held that an unfair labor practice charge, standing alone, constitutes a bargaining demand. The court did not so hold. Rather, it held that the February 15 letter and the unfair labor practice charge together constituted a valid bargaining demand. See Pet. App. 19a. Contrary to petitioner's assertion (Pet. 27), therefore, the decision below is consistent on that score with *RC Aluminum*, where the D.C. Circuit observed that it did not need to "go so far as" to say "that a charge alone could constitute a valid demand." 326 F.3d at 243. Here, it was similarly unnecessary for the court to reach that issue, and it did not do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
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Counsel of Record

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National Labor Relations Board

OCTOBER 2004

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 5-RC-15077

MEDIA GENERAL OPERATIONS, INC. d/b/a RICHMOND TIMES-DISPATCH, EMPLOYER

AND

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, PETITIONER

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three member panel, has considered objections to an election held on August 25, 2000, the Acting Regional Director's report recommending disposition of them, and the Regional Director's Order Denying the Employer's Motion for Reconsideration of the Acting Regional Director's report. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 ballots for and 15 ballots against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Acting Regional Director's and Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that majority of the valid ballots have been cast for International Association of Machinists & Aerospace Workers, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance machinists, HVAC technicians, electro mechanical technicians, electronic technicians, maintenance utility workers, maintenance mechanics, electrical technicians and facilities systems technicians employed by the Employer at its Hanover County, Mechanicsville, VA facility; but excluding all other employees, office clerical employees, professional and managerial employees, watchmen and guards and supervisors as defined in the Act.

Dated, Washington, D.C., January 24, 2001.

_____

John C. Truesdale, Chairman

_____

Peter J. Hurtgen, Member

_____

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 5

CASE 5-RC-15077

MEDIA GENERAL OPERATIONS, INC. d/b/a RICHMOND TIMES-DISPATCH, EMPLOYER

AND

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, PETITIONER

ORDER DENYING MOTION FOR RECONSIDERATION

The Employer's Motion for Reconsideration of the Acting Regional Director's Report on Objections has been carefully considered. The Employer's Motion is denied. As explained below, the Employer fails to raise a substantial and material issue with respect to the circumstances surrounding the signing or distribution of the employee petition sufficient to warrant a hearing.

The Employer argues that the Acting Regional Director erred by failing to conclude that Richard G. Tingler's name on the "We Are Voting Yes" petition at issue was a forgery. The Employer acknowledges, however, that it did not produce a timely handwriting exemplar from employee Tingler in support of its objections. The Employer also concedes what is obvious, that is, William B. Slayton signed his name in cursive in the space next to where Richard Tingler signed his name in printed form, and then Mr. Slayton again printed and signed his name two lines below. In

addition, the exemplars of Mr. Tingler's hand-printed name in the Appendixes attached to the Employer's Motion for Reconsideration fail to establish a forgery. In fact, an examination of the hand-printed exemplars and Mr. Tingler's hand-printed name on the petition reveals that the writings appear to be virtually identical. Most importantly, however, Mr. Tingler confirmed during the Region's investigation of the Employer's objections that he placed his name on the petition and that no one coerced him to do so. That fact remains unquestioned and unrebutted. In these circumstances, the Employer's contention that it was prejudiced by denial of a hearing on this issue lacks merit.

Apart from the alleged forgery, the Employer also argues that the Union somehow improperly used an employee petition to paint a false portrait of employee support during the election campaign. In making this argument, the Employer relies on *NLRB v. Savair*, 414 U.S. 270 (1973), and its progeny. *Savair* and progeny are inapposite. The Supreme Court in *Savair* condemned the union's preelection tactic of offering to waive initiation fees for employees who signed authorization cards before the election. The Court found this to be an improper inducement, since it would allow unions to "buy endorsements and paint a false portrait of employee support during its election campaign." Id. at 277. Where, however, the offer is not limited to those who sign authorization cards before the election, but also is available to employees who sign cards after the election, the offer is not objectionable. Id. at 274 n.4. In the instant case, the actions of the Union did not involve inducements or coercion. The Union did not offer any inducements or confer or promise any benefits in its effort to ascertain the level of its support among

employees. Rather, it asked them to sign the "We Are Voting Yes" petition, which on its face expressly authorized the Union to use it through any method to urge co-workers to vote yes. There is no evidence to support the Employer's contention that "[t]he union 'railroaded' sixteen employees to vote "yes" in the election by inducing them to sign their petition, then using it against them on the eve and morning of the vote." Although some employees may have been influenced to sign the petition by the group dynamic or even a feeling of peer pressure, and then have had second thoughts about having done so, there is no requirement that such employee petitions be signed in solitary sanctity such as accompanies the marking of ballots in a Board-conducted election. As the Employer correctly explained to employees in its September 20 memorandum, the petition "means nothing"; voters have the "absolute right" to vote "yes" or "no" in the Board-conducted secret ballot election regardless of whether they signed the petition.

Finally, the Employer's reliance on *Comcast Cablevision-Taylor v. NLRB*, [232 F.3d 490], 2000 WL 1692757 (6th Cir. 2000), and *Harborside Healthcare v. NLRB*, 230 F.3d 206 (6th Cir. 2000), is misplaced. Unlike the court's finding in *Comcast*, here the Petitioner made no promise of benefit. In *Harborside*, the court found that a supervisor's active support of, and solicitation of authorization cards for, the union required that the election be set aside. No supervisory involvement is alleged here. Hence, even assuming the Sixth Circuit precedents properly are considered in this

proceeding,[1] their application does not require a different result.

In sum, although the election was decided by only one vote, the evidence proffered in support of the Employer's Objections and Motion for Reconsideration raises no substantial and material issues that warrant a hearing or departure from the recommendation that a Certification of Representative issue.

Dated at Baltimore, Maryland this 27th day of December, 2000.

/s/ WAYNE R. GOLD
WAYNE R. GOLD,
Regional Director
National Labor Relations
Board, Region 5
103 S. Gay Street, 8th Floor
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[1] In this regard, I note that this proceeding arises within the geographic area served by the United States Court of Appeals for the Fourth Circuit.